PRELIMINARY DRAFT
No. 3322

PREPARED BY
LEGISLATIVE SERVICES AGENCY
2014 GENERAL ASSEMBLY

DIGEST

Citations Affected: IC 30-4; IC 34-30-2-132.7.

Synopsis: Legacy trust. Provides that a protective provision in a legacy trust prevents a creditor of the settlor from satisfying a claim from the settlor's interest in the trust estate when the settlor is also a beneficiary of the trust. Authorizes the establishment of legacy trusts. Prescribes the procedures for establishing a legacy trust. Bars most claims against a legacy trust. Permits claims for certain fraudulent transfers, to enforce certain child support orders, and to enforce certain orders for the division of property with respect to a dissolution of marriage or a legal separation. Provides immunity to the trustees and advisers of legacy trusts and the professionals involved in establishing legacy trusts. Provides that the rule against perpetuities does not apply to personal property or an interest in personal property in a legacy trust. Provides that the rule against perpetuities does not apply to real property or an interest in real property in a legacy trust if the real property or interest in real property is subject to the trustee's right to sell property.

Effective: July 1, 2014.

A BILL FOR AN ACT to amend the Indiana Code concerning trusts and fiduciaries.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 30-4-3-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2014]: Sec. 2. (a) The settlor may provide in the terms of the trust that the interest of a beneficiary may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.

(b) Except as otherwise provided in subsection (c), if the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of ~~his~~ **the settlor's** beneficial interest will not prevent ~~his~~ **the settlor's** creditors from satisfying claims from ~~his~~ **the settlor's** interest in the trust estate.

(c) ~~Subsection (a) applies to a trust that meets both of the following requirements, regardless of whether or not the~~ **A protective provision similar to that authorized by subsection (a) prevents a creditor of the settlor from satisfying a claim from the settlor's interest in the trust estate when the** settlor is also a beneficiary of the trust **if the trust is one (1) of the following:**

(1) A trust that meets both of the following requirements:

~~(1)~~ **(A)** The trust is a qualified trust under 26 U.S.C. 401(a).

~~(2)~~ **(B)** The limitations on each beneficiary's control over the beneficiary's interest in the trust complies with 29 U.S.C. 1056(d).

(2) A legacy trust established under IC 30-4-8.

(d) A trust containing terms authorized under subsection (a) may be referred to wherever appropriate as a trust with protective provisions.

SECTION 2. IC 30-4-8 IS ADDED TO THE INDIANA CODE AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2014]:

Chapter 8. Legacy Trusts

Sec. 1. This chapter applies to:

(1) qualified dispositions to legacy trusts; and

(2) dispositions by transferors who are trustees;

that are made after June 30, 2014.

Sec. 2. Unless the context requires otherwise, the following definitions apply throughout this chapter:

(1) "Claim" means a right to payment, regardless of whether the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, immature, disputed, undisputed, legal, equitable, secured, or unsecured.

(2) "Creditor" means a person who has a claim against the transferor.

(3) "Debt" means liability on a claim.

(4) "Disposition" means a transfer, conveyance, or assignment of property, including a change in the legal ownership of property that occurs when a trustee is substituted for another trustee or when at least one (1) trustee is added. The term also includes the exercise of a power that causes a transfer of property to a trustee. However, the term does not include the release or relinquishment of an interest in property that, until the release or relinquishment, was the subject of a qualified disposition.

(5) "Investment decision" means the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership of or rights in an investment.

(6) "Legacy trust" means an irrevocable trust established under section 3 of this chapter.

(7) "Person" means an individual at least eighteen (18) years of age, a corporation, a trust, a limited liability company, a limited liability partnership, a partnership, a governmental entity, the state, or a political subdivision of the state.

(8) "Property" means real property, personal property, or an interest in real or personal property.

(9) "Qualified affidavit" means a sworn affidavit executed under section 5 of this chapter.

(10) "Qualified disposition" means a disposition by a transferor to a legacy trust established under section 3 of this chapter.

(11) "Qualified trustee" means a person qualified to serve as the trustee of a legacy trust under section 6 of this chapter.

(12) "Transferor" is a person who as:

(A) an owner of property;

(B) a holder of a power of appointment that authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate, or the creditors of the holder's estate; or

(C) a trustee;

directly or indirectly makes a disposition or causes a disposition to be made.

(13) "Trust adviser" means a person given authority by the terms of a legacy trust to direct, consent to, or disapprove actual or proposed investment decisions, distribution decisions, or other decisions related to property in a legacy trust.

Sec. 3. A legacy trust is established by:

(1) designating in writing in the trust that the trust is a legacy trust established under this chapter;

(2) including the terms required by section 4 of this chapter in the legacy trust; and

(3) delivering a qualified affidavit containing the statements required by section 5 of this chapter to the qualified trustee.

Sec. 4. A legacy trust must do the following:

(1) Provide for the appointment of at least one (1) qualified trustee for the property that is the subject of a qualified disposition.

(2) Expressly incorporate Indiana law to govern the validity, construction, and administration of the trust.

(3) Be irrevocable.

(4) Provide that the interests of the transferor or beneficiary in the trust property or the income from the trust property may not voluntarily or involuntarily be transferred, assigned, pledged, or mortgaged before the qualified trustee actually distributes the property or income to the beneficiary.

Sec. 5. (a) A qualified affidavit must state the following:

(1) That the transferor has full right, title, and authority to transfer the property to the legacy trust.

(2) That the transfer of the property to the legacy trust will not render the transferor insolvent.

(3) That the transferor does not intend to defraud a creditor by transferring the property to the legacy trust.

(4) That there are no pending or threatened court actions against the transferor other than the court actions identified by the transferor and attached to the qualified affidavit.

(5) That the transferor is not involved in any administrative proceedings other than the administrative proceedings identified by the transferor and attached to the qualified affidavit.

(6) That the transferor does not contemplate filing for relief under the federal bankruptcy code.

(7) That the property transferred to the legacy trust is not derived from unlawful activities.

(b) Except as provided in subsection (c), a qualified affidavit must be signed by the transferor.

(c) In the case of a disposition by a transferor who is a trustee, the qualified affidavit must be signed by the transferor who made

the original disposition to the trustee. A qualified affidavit signed under this subsection must state the facts as of the time of the original disposition.

(d) If a transferor is a married individual at the time a qualified affidavit is signed, the transferor shall provide a copy of the qualified affidavit to the transferor's spouse.

Sec. 6. (a) A person may serve as a qualified trustee of a legacy trust if the person is not the transferor and satisfies either of the following requirements:

(1) In the case of an individual, the individual is a resident of Indiana.

(2) In all other cases, the person is:

(A) authorized by Indiana law to act as a trustee; and

(B) subject to the supervision of:

(i) the department of financial institutions; or

(ii) the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, or any successor to these agencies.

(b) A qualified trustee shall do the following:

(1) Maintain or arrange for providing custody of the property subject to the qualified disposition in Indiana.

(2) Maintain complete and accurate records for the legacy trust on an exclusive or nonexclusive basis.

(3) Prepare or arrange for the preparation of all required tax returns for the legacy trust.

(4) Materially participate in the administration of the legacy trust.

Sec. 7. (a) Except as provided in section 8 of this chapter, no cause of action of any kind, including a cause of action to enforce a judgment, may be brought for:

(1) an attachment or other provisional remedy against property that is the subject of a qualified disposition to a legacy trust; or

(2) the avoidance of a qualified disposition to a legacy trust.

The protections provided to a qualified disposition by this subsection apply notwithstanding any law to the contrary set forth outside of this chapter.

(b) If a court declines to apply Indiana law in determining the effect of a spendthrift provision in a legacy trust in an action brought against a legacy trust, the trustee of the legacy trust shall immediately resign and, without further order of any court, cease to be the trustee of the legacy trust. When a trustee resigns under this section, the trustee has only the power to convey the trust property to a successor trustee appointed under this section. A successor trustee shall succeed the resigning trustee in accordance

with the terms of the legacy trust. If the trust does not provide for a successor trustee and the trust would otherwise be without a trustee, any beneficiary of the trust may petition an Indiana court to appoint a successor trustee. The Indiana court receiving the petition shall appoint a successor trustee to serve in accordance with the terms and conditions that the court determines are consistent with the purposes of the trust and this chapter.

(c) A legacy trust and its property are protected under this section regardless of whether or not the transferor:

(1) serves as a trust adviser under section 12 of this chapter; or

(2) retains a power described in section 13 of this chapter.

Sec. 8. (a) A claim against property that is the subject of a qualified disposition to a legacy trust is barred by section 7 of this chapter unless the claim is one (1) of the following:

(1) Except as provided in subsection (b), an action brought in Indiana under the Uniform Fraudulent Transfer Act (IC 32-18-2) where the requirements for recovery under the act are met by clear and convincing evidence.

(2) An action to enforce the child support obligations of the transferor under a judgment or court order in existence at the time of the transferor's qualified disposition to the legacy trust.

(3) A court judgment or order for the division of property in a dissolution of the transferor's marriage or a legal separation between the transferor and the transferor's spouse, if the transferor's distribution to the legacy trust was made:

(A) after the date of the transferor's marriage that is subject to the dissolution or legal separation; or

(B) within thirty (30) days before the date of the transferor's marriage that is subject to the dissolution or legal separation unless the transferor provided written notice of the qualified disposition to the other party to the marriage at least three (3) days before making the qualified disposition.

(4) An action to enforce an obligation that is:

(A) incurred or entered into by the legacy trust or by the trustee of the legacy trust in the trustee's fiduciary capacity as a lender, a borrower, a guarantor, or a party to a contract, lease, or other transaction; and

(B) consistent with the terms of the legacy trust, the trustee's powers, and the purposes of the legacy trust.

(b) A claim brought under an action described in subsection (a)(1) is extinguished unless:

(1) the creditor's claim arose before the qualified disposition to a legacy trust was made and the action is brought not later

than the later of:

(A) two (2) years after the transfer was made; or

(B) six (6) months after the transfer:

(i) was recorded or made a public record; or

(ii) if not recorded or made a public record, was discovered or could have reasonably been discovered by the creditor; or

(2) notwithstanding IC 32-18-2-19, the creditor's claim arose concurrent with or after the qualified disposition and the action is brought not more than two (2) years after the date of the qualified disposition.

(c) A qualified disposition made by a transferor who is a trustee is considered for purposes of this chapter to have been made on the date that the property that is subject to the qualified disposition was originally transferred in trust to the trustee or any predecessor trustee in a form that satisfies section 4(3) and 4(4) of this chapter.

(d) If more than one (1) qualified disposition is made by means of the same legacy trust:

(1) the making of a subsequent qualified disposition is disregarded when determining whether a creditor's claim with respect to a prior qualified disposition is extinguished under subsection (b); and

(2) any distribution to a beneficiary is considered to have been made from the latest qualified disposition.

Sec. 9. (a) If a creditor's claim is allowed under section 8 of this chapter, the transferor's qualified disposition to a legacy trust is subject to the claim only to the extent necessary to satisfy the transferor's debt to the creditor making the allowed claim.

(b) If a creditor's claim is allowed under section 8 of this chapter, the claim is limited as follows:

(1) If the court is satisfied that a qualified trustee has not acted in bad faith in accepting or administering the property that is the subject of the qualified disposition:

(A) the qualified trustee has a first and paramount lien against the property that is the subject of the qualified disposition in an amount equal to the entire cost, including attorney's fees, properly incurred by the qualified trustee in the defense of the action or proceedings filed by the creditor;

(B) the creditor's claim shall be allowed subject to the proper fees, costs, preexisting rights, claims, and interests of the qualified trustee and of any predecessor qualified trustee that had not acted in bad faith; and

(C) it is presumed that the qualified trustee did not act in bad faith merely by accepting the property that is the subject of the qualified disposition.

(2) If the court is satisfied that a beneficiary of a legacy trust has not acted in bad faith:

(A) the creditor's claim is subject to the right of the beneficiary to retain any distribution made upon the exercise of a trust power or the discretion vested in the qualified trustee that was properly exercised before the creditor commenced an action to enforce the claim; and

(B) it is presumed that the beneficiary, including a beneficiary who is also a transferor, did not act in bad faith merely by creating the legacy trust or by accepting a distribution made in accordance with the terms of the legacy trust.

Sec. 10. A spendthrift provision described in section 4(4) of this chapter is considered a restriction on the transfer of the transferor's beneficial interest in the trust that is enforceable under applicable nonbankruptcy law within the meaning of Section 541(c)(2) of the federal Bankruptcy Code (11 U.S.C. 541(c)(2)) or any successor provision of the federal Bankruptcy Code.

Sec. 11. Except as permitted by the terms of a legacy trust and by sections 12 and 13 of this chapter, the transferor may not have any rights or authority with respect to the principal or income of the legacy trust. An agreement or understanding purporting to grant or permit the retention of any greater rights or authority is void.

Sec. 12. A transferor who makes a qualified disposition may also serve as an investment adviser to the trust. However, the transferor may not serve as a trust adviser to a legacy trust except with respect to the retention of a veto right permitted by section 13(a)(1) of this chapter.

Sec. 13. (a) A legacy trust is not considered revocable because of the inclusion of one (1) or more of the following:

(1) A transferor's power to veto a distribution from the trust.

(2) A power of appointment (other than the power to appoint to the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate) that may be exercised by will or other written instrument of the transferor that is effective only upon the transferor's death.

(3) The transferor's potential or actual receipt of income or principal, including right to income retained in the trust.

(4) The transferor's potential or actual receipt of income or principal from a charitable remainder unitrust or charitable remainder annuity trust (as those terms are defined in Section 664 of the Internal Revenue Code).

(5) The transferor's potential or actual receipt of income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under Section 2702 of the

Internal Revenue Code.

(6) The transferor's potential or actual receipt or use of principal when that potential or actual receipt or use results from a qualified trustee's acting:

(A) in the qualified trustee's discretion;

(B) under a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade, or appropriate property for the benefit of the transferor unless the power of the transferor is limited by an ascertainable standard relating to health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code; or

(C) at the direction of an adviser described in section 14 of this chapter who acts:

(i) in the adviser's discretion; or

(ii) under a standard that governs the distribution of principal and does not confer upon the transferor a power to consume, invade, or appropriate property for the benefit of the transferor unless the power of the transferor is limited by an ascertainable standard relating to health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or Section 2514(c)(1) of the Internal Revenue Code.

(7) The transferor's right to remove a trustee or adviser and to appoint a new trustee or adviser as long as that right does not include the appointment of a person who is a related or subordinate party to the transferor within the meaning of Section 672(c) of the Internal Revenue Code.

(8) The transferor's potential or actual use of real property held under a qualified personal residence trust (as defined in Section 2702(c) of the Internal Revenue Code).

(b) For purposes of subsection (a)(6)(A), a qualified trustee is presumed to have discretion with respect to the distribution of principal unless that discretion is denied to the qualified trustee by the terms of the legacy trust.

Sec. 14. (a) A transferor may appoint one (1) or more advisers who may have authority under the terms of the trust:

(1) to remove and appoint qualified trustees or trust advisers; and

(2) to direct, consent to, or disapprove distributions from the trust.

(b) Trust advisers are not required to satisfy the requirements imposed upon trustees by section 6 of this chapter.

Sec. 15. If:

(1) a qualified trustee of a legacy trust ceases to meet the

requirements of section 6 of this chapter; and

(2) there remains no trustee of the legacy trust that meets the requirements of section 6 of this chapter;

the qualified trustee described in subdivision (1) is considered to have resigned when the qualified trustee ceased to meet the requirements of section 6 of this chapter, and a successor trustee provided for in the legacy trust shall become a qualified trustee. If the legacy trust does not provide for a successor qualified trustee, a court shall appoint a successor qualified trustee upon the application of any interested party.

Sec. 16. (a) Notwithstanding any provision of law to the contrary, a person is entitled to only the rights with respect to a qualified disposition that are provided by this chapter. No person, including a creditor whose claim arises before or after a qualified disposition, may bring a claim or a cause of action against:

(1) a trustee or an adviser of a legacy trust; or

(2) any person involved in the counseling, drafting, preparation, execution, or funding of a legacy trust.

(b) This subsection applies to a cause of action to enforce a judgment notwithstanding any provision of law to the contrary. A cause of action to enforce a judgment may not be brought at law or equity against:

(1) a trustee or adviser of a legacy trust; or

(2) any person involved in the counseling, drafting, preparation, execution, or funding of a legacy trust;

if, as of the date of the cause of action, a cause of action by a creditor with respect to the legacy trust would be barred by this section.

(c) For purposes of this section, the counseling, drafting, preparation, execution, and funding of a legacy trust include the counseling, drafting, preparation, execution, and funding of a limited partnership or a limited liability company if interests in the limited partnership or limited liability company are subsequently transferred to the legacy trust.

Sec. 17. The common law rule against perpetuities and the Uniform Statutory Rule Against Perpetuities (IC 32-17-8) do not apply to:

(1) personal property or an interest in personal property in a legacy trust;

(2) real property or an interest in real property in a legacy trust if the real property or interest in real property is subject to the trustee's right to sell property; or

(3) the terms and provisions of a legacy trust that are consistent with the exemptions provided by subdivisions (1) and (2).

Sec. 18. (a) A provision of the trust code (IC 30-4) set forth

outside of this chapter applies to a legacy trust established under this chapter unless the provision:

(1) conflicts with a statute set forth in this chapter; or

(2) would jeopardize the protection from creditors provided by this chapter to the legacy trust.

(b) The provisions and protections set forth in this chapter control whenever a provision of the trust code (IC 30-4) set forth outside of this chapter:

(1) conflicts with a statute set forth in this chapter; or

(2) would jeopardize the protection from creditors provided by this chapter to a legacy trust.

SECTION 3. IC 34-30-2-132.7 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2014]: **Sec. 132.7. IC 30-4-8-16 (Concerning legacy trusts).**